Court of Appeals, State of Michigan

ORDER

Howard Casey v Hastings Mutual Insurance Company

Docket No. 258203

LC No. 02-001861-CK

Kirsten Frank Kelly
Presiding Judge

Kathleen Jansen

Michael J. Talbot
Judges

The Court orders that the motion for reconsideration is GRANTED, and this Court's opinion issued April 11, 2006 is hereby VACATED. A new opinion is attached to this order.

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

JUN 2 0 2006
Date

Sandra Schultz Mengel
Chief Clerk

STATE OF MICHIGAN

COURT OF APPEALS

HOWARD CASEY and CONNIE LEGG,

Plaintiffs-Appellees,

v

HASTINGS MUTUAL INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED
April 11, 2006

No. 258203
Ingham Circuit Court
LC No. 02-001861-CK

Before: Kelly, P.J., and Jansen and Talbot, JJ.

PER CURIAM.

In this declaratory action arising from a homeowner's insurance contract, defendant appeals as of right the trial court's judgment against it for $90,000 plus interest. We affirm.

Defendant first contends that the trial court erred in ruling that defendant's rejection letter did not operate to reject plaintiffs' residence valuation. We disagree.

Plaintiffs' motion for declaratory relief was essentially brought under MCR 2.116(C)(10) because the trial court considered documentary evidence outside the pleadings. See *Steward v Panek*, 251 Mich App 546, 555; 652 NW2d 232 (2002). "This Court reviews de novo a trial court's grant or denial of summary disposition in a declaratory judgment action." *Michigan Ed Employees Mut Ins Co v Turrow*, 242 Mich App 112, 114; 617 NW2d 725 (2000). In so doing, this Court "'must consider the available pleadings, affidavits, depositions, and other documentary evidence in a light most favorable to the nonmoving party and determine whether the moving party was entitled to judgment as a matter of law.'" *Id.*, quoting *Unisys Corp v Comm'r of Ins*, 236 Mich App 686, 689; 601 NW2d 155 (1999).

The record demonstrates that plaintiffs submitted to defendant a sworn statement of proof of loss specifying the value of plaintiffs' residence and personal property. Defendant responded with a letter rejecting plaintiffs' statement of proof of loss. The only reasons articulated for rejecting the proof of loss related to plaintiffs' valuation of personal property, not the valuation of plaintiffs' residence.

Pursuant to MCL 500.2122(1) of the Insurance Code, "An insurer or agent, upon making a declination of insurance, shall inform the applicant of each specific reason for the declination." "Generally, once an insurance company has denied coverage to an insured and stated its

defenses, the insurance company has waived or is estopped from raising new defenses." *Kirschner v Process Design Assoc, Inc*, 459 Mich 587, 593; 592 NW2d 707 (1999). Because the only reasons defendant gave for rejecting plaintiffs' proof of loss related to the personal property valuation, the trial court correctly precluded defendant from challenging plaintiffs' residence valuation.

Defendant next argues that, under the policy terms, plaintiffs were required to repair or replace their residence to receive replacement-cost benefits. We disagree.

Because plaintiffs' loss exceeded the policy limits, under MCL 500.2827, the policy limits must be paid regardless of whether plaintiffs rebuild or replace their residence. MCL 500.2827(3) provides:

> The contract of insurance established pursuant to subsection (1) may provide that there shall be no liability on the part of the insurer to pay an amount in excess of the actual cash value of the lost or damaged insured property at the time of the loss or damage, unless the lost or damaged property is actually repaired, rebuilt, or replaced at the same or another contiguous site. However, this subsection shall not apply if the amount of loss or damage to the insured property under the standard of subsection (1) exceeds the amount of liability covered by the contract.

In *Cortez v Fire Ins Exch*, 196 Mich App 666, 669; 493 NW2d 505 (1992), the policy provided for replacement costs for "'equivalent construction.'" This Court concluded that MCL 500.2827 applied because it "addresse[d] replacement-cost policies that require the insurer to rebuild or replace the lost or damaged property 'to a condition and appearance *similar* to that which existed at the time of loss based on the use of *conventional* materials and construction methods.'" *Id.* This Court held that, pursuant to MCL 500.2827(3), when the replacement cost of the insured's property exceeds the policy limits, the insured is not required to repair or replace the property to receive replacement-cost benefits. *Id.* at 670.[1]

In this case, the policy similarly provides for replacement costs for like construction. Plaintiffs presented uncontradicted evidence that the cost to rebuild the residence would exceed the policy limit. Thus, pursuant to MCL 500.2827(3), defendant must pay plaintiffs replacement-cost benefits regardless of whether plaintiffs actually repair or replace the property.[2]

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[1] Defendant's reliance on *Smith v Michigan Basic Prop Ins Ass'n*, 441 Mich 181; 490 NW2d 864 (1992), is misplaced because MCL 500.2827(3) did not apply in that case. *Id.* at 187 n 6.

[2] In light of this analysis and conclusion, we need not address defendant's remaining issue on appeal.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Kathleen Jansen
/s/ Michael J. Talbot